UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LARRY DEAN ROLLINS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 03-82-B-W
	)	
MARTIN A. MAGNUSSON, et al.,	)	
	)	
Defendants	)	

Recommended Decision on Motion for Summary Judgment

Larry Rollins is an inmate at the Maine State Prison. He has brought a 42 U.S.C. § 1983 action claiming that the defendants were deliberately indifferent to his serious medical needs in monitoring and treating his diabetes in contravention of the Eighth Amendment prohibition against cruel and unusual punishment.[1] (Docket No. 1.) The defendants break down into two groups: The Prison Health Services and its employees and the correctional supervisors and staff. The Prison Health Service defendants have moved for summary judgment. (Docket No. 147.) The correctional defendants have joined this motion (Docket No. 161) and Rollins has objected to this attempt to take advantage of PHS's tail wind (Docket No. 165). I now overrule Rollins's objection to the

[1] Rollins suggests that his treatment violated prison policy, statutes and regulations, and the Fourteenth Amendment, in depriving him of his liberty without due process of law. (Docket No. 154 at 7; Docket No. 157 at 10.) He also states that the PHS breached its contract with the Maine State Prison. (Docket No. 155 at 3.) In setting forth his Eighth Amendment count he refers to violations of his right to equal protection and he even mentions an ADA claim in one of his many affidavits in response to the summary judgment motion. (Docket 158 at 9.) In an order dated April 21, 2004, (Docket No. 143) I indicated that Rollins could not proceed with these discrimination claims via a motion to amend his complaint as he was attempting to interject new legal theories too late into this suit's procession. Accordingly, at this stage of this action I conclude that his only cognizable claims, based on his complaint and the summary judgment record, are predicated on the Eighth Amendment.

correctional defendants' decision to join the PHS defendants' motion and recommend that the Court **GRANT** the motion for summary judgment for the following reasons.

Discussion

Section 1983 of title 42 provides that a "person who, under color of any statute, ordinance, regulation, custom, or usage ...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.[2]

The Eighth Amendment of the United States Constitution provides that cruel and unusual punishment shall not be inflicted. U.S. Const. Amend. VIII. Because of this prohibition, the prison is charged with providing Rollins with, in the very least, "'the minimal civilized measure of life necessities,'" Wilson v. Seiter, 501 U.S. 294, 298 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)), including necessary medical care, see generally Farmer v. Brennan, 511 U.S. 825 (1994); Estelle v. Gamble, 429 U.S. 97 (1976). However, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. There, thus, are two components to the analysis: an objective test of the seriousness of the medical need and a subjective inquiry into the defendants' awareness of the condition and need for treatment. While prison officials have significant responsibilities for inmate

[2] The PHS defendants do not dispute that they were acting under color of state law. See Natale v. Camden County Corr. Facility, 318 F.3d 575, 581 & n.4 (3d Cir. 2003).

health care, it is also clear that inmates do not have a right to limitless doctor visits or their choice of medications, and negligence and medical malpractice are not actionable. Daniels v. Williams, 474 U.S. 327 (1986) (noting that 42 U.S.C. § 1983 provides a right of action for civil rights violations and cannot be used to sue correctional officials for negligence).

With this legal standard framing the analysis, the defendants are entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would affect the outcome of the suit under the Eighth Amendment standard for cruel and unusual punishment/deliberate indifference, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for [Rollins as] nonmoving party," id. I view the record in the light most favorable to Rollins and I indulge all reasonable inferences in his favor. See Savard v. Rhode Island, 338 F.3d 23, 25 -26 (1st Cir. 2003).

Defendants' Statement of Material Fact

Diabetes

Rollins was transferred to the Maine State Prison on January 11, 2002. The intake examination performed at that time notes that he has adult onset type II diabetes.[3] At the time he arrived, he was receiving glucophage for treatment of this condition. That prescription was continued. (Defs' SMF ¶ 1.)

[3] Rollins explains that he first was diagnosed with diabetes on October 22, 2001, at the Augusta Mental Health Institute. (Docket No. 157 at 6.)

Rollins did not have complaints referable to diabetes or his vision until December 20, 2002. At that time, he presented to the medical department for an eye examination and complained of severely impaired vision. (Id. ¶ 2.) Rollins's blood sugar level was tested and found to be elevated. This was brought under control by administration of insulin. His level returned to normal later that day. (Id. ¶ 3.) Rollins was seen the next day in the chronic care clinic. He again complained of vision problems. The medical department tested his blood sugar again, and it was elevated. Again, this was brought under control with insulin. At that time, the medical department adjusted his glucophage prescription and ordered more frequent blood tests, from three times a week to daily. (Id. ¶ 4.) After these incidents, Rollins submitted frequent complaints relating to his diabetic condition. Linda Ross, a nurse on the medical department staff, met with Rollins on February 28, 2003, to discuss his multiple sick call slips and his accusation that the medical department was deliberately indifferent to his problems. According to her note, she repeatedly discussed all of the Rollins's issues with him and attempted to educate him about diabetes care. Ross noted: "He asks for the same thing over and over." (Id. ¶ 5.)

On March 3, 2003, another staff nurse met with Rollins to discuss his "multiple issues" of diabetes, vision and foot problems and noted she was "unable to reason" with him. (Id. ¶ 6.) Because Rollins continued to file multiple sick call slips, the Health Service Administrator, Lucia Elder, and Ross met with him on March 28, 2003. At that time, Rollins was advised to come to the medical department twice a day to have his blood sugar tested. They spoke to him about sharing his dietary supplements with other inmates and he agreed to stop doing that. Finally, Ross was assigned to be the inmate's case manager and to respond to all of his non-emergency concerns. (Id. ¶ 7.) Ross met

with Rollins on April 8, April 17, May 8, May 15 and June 16, 2003. In addition, Rollins was seen by other medical staff frequently during this time for various complaints. (Id. ¶ 8.)

It is Englander's opinion that Rollins's diabetes has been well-controlled with medication, except when he has been non-compliant. On July 31, 2003, for example, security staff notified the medical department that the inmate had been hoarding his dietary supplements in his cell rather than consuming them as prescribed. These supplements are necessary for proper control of his blood sugar levels. (Id. ¶ 9.)

Sick call slips submitted by inmates are retained as part of their record. Between February 11, 2002, and November 2, 2003, Rollins submitted 164 sick call slips. In Englander's experience this is far more than any other inmate. (Id. ¶ 10.)

Vision Complaints

The prison optometrist performed a routine eye examination of Rollins on January 25, 2002. (Id. ¶ 11.) Nearly 12 months later, in response to Rollins's complaint of impaired vision, another eye examination was performed on December 20, 2002. This was a "normal" examination. (Id. ¶ 12.)[4] Rollins has an abnormality of the optic nerve called "cupping." This abnormality is frequently associated with glaucoma, but it is not necessarily indicative of glaucoma. Because of the presence of "cupping," the prison optometrist measures Rollins's intraocular pressure on a regular basis. His pressures were checked in January, March and December of 2002 and in March, June (twice), July, August (twice) and September, 2003. (Id. ¶ 13.) Because of Rollins's continuing complaints of impaired vision and pain and pressure in his eyes, Englander referred him

[4] I am not sure what weight to give this statement as it is entirely unexplained as to what Englander means by "normal." The examination was conducted in a routine manner? Rollins's eyes were normal in the sense of 20/20 vision with no conditions?

to an ophthalmologist, Dr. Robert Dreher. Dreher examined Rollins on June 12, 2003. Dreher reported that Rollins had no diabetic eye changes, that he had myopia and photosensitivity, that his intraocular pressure was normal, and that the cause of his eye pain was unknown. (Id. ¶ 14.) Dreher saw Rollins in follow-up on August 10, 2003, and noted a normal examination. (Id. ¶ 15.) Because Rollins complained of decreased peripheral vision, the doctor again referred him to Dreher, who saw him on October 7, 2003. Dreher reported that Rollins's visual field test was so restricted that it was "extremely unusual and unlikely." The only objective findings were of myopia and optic nerve cupping. (Id. ¶ 16.) Dreher performed repeat visual field testing on December 3, 2003. At that time he reported an abnormally small subjective visual field. Dreher stated: "It seems most likely that this is not a real visual field cut because patients with vision down to that small a field have trouble walking around without bumping into other people, doorways. etc., and I noticed none of that with him." Dreher recommended that no further investigation be pursued into the veracity of Rollins's visual field. (Id. ¶ 17.)

Englander also referred Rollins for an MRI scan of the brain to rule out the possibility of an optical chiasm tumor affecting his vision. That study was performed on March 2, 2004, and was negative. (Id. ¶ 18.)

Rollins's Claimed Factual Disputes[5]

Rollins principally, if not solely, complains about the care of his medical condition in the seven-month period between April 2002 and October 2002, a period not touched upon by the defendants in setting forth their facts. It is Rollins's contention that, although there was a doctor's standing order for regular blood glucose tests, per the January 9, 2002, admission physical, as well as his records which came with him (see Docket No. 160 Attach. 23; Docket No. 162 at 4), Rollins did not have his blood tested at all in the period between April and October 2002[6] and the absence of the testing is

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[5] Rollins's multiple responses to the defendants' motion and statement of material fact do not conform to the District of Maine Local Rule 56. Subsection (c) of that rule provides:

> A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. Each such statement shall begin with the designation "Admitted," "Denied," or "Qualified" and, in the case of an admission, shall end with such designation. The opposing statement may contain in a separately titled section additional facts, each set forth in separately numbered paragraphs and supported by a record citation as required by subsection (e) of this rule.

Dist. Me. Loc. R. 56. Instead of following the rule Rollins has filed seven submissions, six of which are at least partially described as an affidavit. One pleading is identified as an "Affidavit of Larry Dean Rollins Response and Opposition to Statement of Material Facts of Defendants" (Docket No. 156), but this is primarily legal argumentation and the numbering that Rollins employs does not align with the statement of material facts by the defendants. Another filing is entitled "Re: Response and Opposition to Statement of Material Fact and Re: Affidavit of Larry Dean Rollins in Opposition to Defendants ...Motion for Summary Judgment." (Docket No. 160.) Attached to this are twenty-four exhibits, twelve of which pertain to discovery and twelve of which are medical records. In their reply, the PHS defendants have, generously, not objected on the grounds that Rollins's summary judgment pleadings are nonconforming. In the dispute over the correctional defendants' attempt to join the PHS motion the issue does arise. But other than critiquing Rollins's summary judgment practice, the correctional defendants have not provided any substantive assistance to the court. I agree Rollins's pleading practice is frustrating. Rollins's pro se status does not relieve him of his obligation to demonstrate that the defendants are not entitled to judgment as a matter of law, see Parkinson v. Goord, 116 F.Supp.2d 390, 393 (W.D.N.Y. 2000) ("[P]roceeding pro se does not otherwise relieve a litigant of the usual requirements of summary judgment"). That being said, I have not found it impossible to identify Rollins's factual contests with the defendants. However, pursuant to the Local Rule, I have deemed the facts as put forth by the PHS defendants as admitted. In actuality Rollins not only did not comply with the Local Rule, he doesn't really controvert the basic facts put forth by the PHS defendants in any event. He embellishes and puts a different spin on the events, without giving details as to which of the named defendants might be involved, but the chronology and major events are fairly consistent between the two accounts.

[6] It is unclear whether this order was for testing at least three times or daily. The record seems to indicate that the physician's order on admission was for daily testing. The diabetic flow sheets show that

manifested by Rollins's medical records for that period. (Docket No. 154 at 1-3, 6; Docket No. 156 at 4; Docket No. 157 at 10; Docket No. 160 at 2-3 & Attachs. 13-24; Docket No. 162 at 4.)[7] Rollins believes that the Eighth Amendment requires blood glucose testing two to four times a day for someone in his condition. (Docket No. 155 at 2, 4, 6; Docket No. 156 at 3, 6; Docket No. 157 at 5.) It is Rollins's claim that the failure to monitor his blood resulted in his becoming insulin dependant and also allowed the development of a diabetic eye complication which caused agonizing pain in both eyes and damaged his peripheral vision. (Docket No. 154 at 2-3, 5; Docket No. 155 at 2, 5.)[8] He states that at no point did he give a verbal or written refusal of the testing. (Docket No. 154 at 7; Docket No. 157 at 12; Docket No. 160 at 3.) He also alleges that Elder told him that sometimes inmates just fall through the cracks and that that was most likely what happened to Rollins apropos the seven-month failure to test. (Docket No. 157 at 11.)

Rollins's blood sugar levels were checked once a day during random dates in January 2002, once or twice daily for most of February 2002, refused three times in early March 2002, and then not resumed until November 11, 2002, at which point it might be said that they were administered at least three times a week. By January 2003 a pattern of daily monitoring develops. Also, in one of his filings Rollins concedes that the defendants may have monitored his blood sugar levels every three months instead of daily but they did so at this interval because they feared that the staff would accidentally become infected with HIV, Hepatitis C, and Neurosyphilis. (Docket No. 157 at 6.) In terms of the testing, Rollins may be referring to the "progress notes" that refer to blood being drawn for testing in June and September of 2002. I could not identify any blood sugar counts relating to these tests. The first notation after the March log notes that I could find of blood glucose levels appears in an October 15, 2002, entry.

[7] Rollins also points out that the blood testing was part of his daily treatment at the Kennebec County Jail and that the defendants had a copy of those records when Rollins was transferred to the prison. (Docket No. 157 at 3; Docket No. 162 at 5.)

[8] Rollins states that his non-testing could have easily resulted in a diabetic coma, (Docket No. 154 at 7; Docket No. 157 at 9) kidney damage, nerve damage or blood vessel (Docket No. 156 at 4; Docket No. 157 at 2). He also notes that inadequate treatment could cause a variety of short-term problems such as excessive urination, constant thirst and hunger, weakness, confusion, dizziness, and seizure. (Docket No. 157 at 2.) Rollins at no time alleges he suffered from these problems (see Docket No. 157 at 3), and, while the risk of future harm from current conditions or treatment can be the basis for Eighth Amendment liability, see Helling v. McKinney, 509 U.S. 25, 32-35 (1993), absent some documentation of evidentiary weight as to how the failure to test Rollins may concretely lead to these results down the road, this conjecture about the possibility of other conditions is of no weight in this dispute.

Rollins believes that the failure to follow the doctor's standing order was "so well settled and widespread" that the policymaking officials of PHS can be said to have either actual or constructive knowledge of the unconstitutional custom of not following his prescribed standing order. (Docket No. 154 at 6; Docket No. 155 at 2; Docket No. 158 at 8; Docket No. 160 at 2.)[9] He states the PHS subordinates' abuses were so apparent that the knowledge can be imputed to the supervisors who had a duty to rectify the problem (Docket No. 155 at 5; Docket No. 162 at 6) and he alleges that most of the PHS defendants were personally involved in his treatment. (Docket No. 154 at 9; Docket No. 155 at 1; Docket No. 162 at 6.) He further argues that there was a failure to train the PHS staff to assure that prescribed procedures were followed. (Docket No. 154 at 7; Docket No. 155 at 2.)[10]

Rollins also faults the defendants for not giving him nutritional counseling and education earlier than they did; he states that it took a year and the worsening of his diabetic condition before he received vitally important information and education vis-à-vis his diabetic condition. (Docket No. 154 at 5; Docket No. 156 at 3; Docket No. 157 at 6.) In fact, Rollins states, he did not complain earlier about his vision because he thought his aging was causing the change; he had never been informed that diabetes could cause vision complications. (Docket No. 157 at 8.) He argues that inmates with medical conditions such as diabetes require education concerning medications, attending appointments, and making determinations as to when medical attention is required and should be requested. (Docket No. 156 at 6; Docket No. 157 at 8.) He claims that PHS

[9] He also thinks that PHS can be held liable on a theory of municipal liability for a policy or custom based on a single instance of alleged misconduct. (Docket No. 155 at 7.)

[10] Rollins concedes that his diabetic condition has been treated with medication since his admission to the prison. (Docket No. 154 at 4.) His complaint is not with a lack of treatment, but rather that the defendants did not conduct the necessary tests to monitor his blood sugar level.

failed to provide a diet tailored to a diabetic inmate and did not provide snacks appropriate for a diabetic during the same seven-month period he went without testing. (Docket No. 157 at 2; Docket No. 157 at 7.)

With respect to the treatment of his eye condition Rollins explains that he was panicked and stricken with fear with the thought of going blind during the onset of his vision condition. (Docket No. 157 at 9.) He could not see his fingers in front of his face and was very dizzy. (Id.) On the day he went to seek help, clinic access was initially refused him but Rollins began to scream and a guard finally allowed him access to the clinic. (Id.) He asserts that Doctor Blaine Littlefield saw him and indicated that diabetes was the source of his vision problem.[11] (Id.) Littlefield, according to Rollins, recommended many times to have a medical eye test done and the PHS defendants for some time ignored his written recommendations. (Docket No. 154 at 5.) Conceding that he is not an expert witness, Rollins asserts that Littlefield is a material fact witness who can testify to the injury to his eye sustained by Rollins. (Docket No. 154 at 8; Docket No. 155 at 1.) The bottom line of his argument is that the defendants' failure to keep his diabetes under tight control during the seven months he went without testing lead to his eye damage as well as the worsening of his diabetic condition. (Docket No. 155 at 4.)[12]

Finally, in his fourth responsive filing, Rollins alleges that the reason behind the failure to conduct the blood testing as ordered was that Rollins is infected with HIV,

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[11] Rollins does not explain when he went to see Littlefield, but the logical inference based upon the defendants' statement of material facts, ¶ 2, is that the contact occurred December 20, 2002. This would have been after testing resumed in November 2002. (See Docket No. 160, Attach. 14). The seven months wherein Rollins claims to have been unconstitutionally denied testing stretched from April to October.

[12] Rollins asserts also that the defendants failed to transfer his medical records with him to the ophthalmologist Doctor Robert Dreher which is against Maine State Prison policy. (Docket No. 156 at 7,8.) I am unable to determine the contents of these records or at what juncture this failure to transfer allegedly occurred. With respect to this claim, Rollins states that it is "not consistent with the goal of an integrated medical care system and could be life threatening for certain inmates with certain conditions. (Docket No. 156 at 8.)

Hepatitis C, and Neurosyphilis and the defendants told him that they did not have the proper protection to conduct the testing on a daily basis. (Docket No. 157 at 2, 12.) In a subsequent affidavit Rollins states that he is very embarrassed by the fact that he has these infections and has attempted to keep the fact of infection confidential. (Docket No. 158 at 1.) He claims that the PHS defendants deliberately caused the seven-month delay in blood glucose tests so as not to put the nurses at the daily risk of exposure to infection. (Id. at 2, 5.) Rollins informed them at the time that it was discriminatory not to give him the daily blood glucose test on these grounds. He became embarrassed and ashamed when a PHS nurse further stated, shouting, that the staff simply did not have the proper protection for all of their medical care providers and other staff to deal with Rollins's HIV, Hepatitis C, and Neurosyphilis infected blood. (Id. at 3, 6-7.) Other inmates heard her and they all started screaming, shouting, and laughing, saying, "You dido infested son of a bitch. ... Nobody wants to catch that shit. Nasty f[___]ing nigger," and so on. (Id. at 3.) After this incident, Rollins never had the nerve to ask for blood glucose monitoring and the defendants exploited his fear, he contends, to control him. (Id. at 4-5.)

Discussion

In their reply to Rollins's motion, the defendants acknowledge that Rollins "may have succeeded in generating an issue of fact" concerning the failure to receive blood glucose tests as ordered for a seven-month period. (PHS Resp. (sic), Pl.'s Opp'n Summ. J. at 1.) However, in their view the fact is not "material." (Id.)

The defendants cite to Gaudreault v. Municipality of Salem and its statement that: "A medical need is 'serious' if it is one that has been diagnosed by a physician as mandating treatment, or one that is so obvious that even a lay person would easily

recognize the necessity for a doctor's attention." 923 F.2d 203, 208 (1st Cir. 1990) (citing Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3rd Cir.1987) and Hendrix v. Faulkner, 525 F.Supp. 435, 454 (N.D.Ind.1981)). They state that, although there is evidence that Rollins has diabetes, there is no evidence beyond Rollins's "own hyperbolic declarations" that Rollins suffered from any serious ill effects from his diabetes while at the prison. (PHS Mot. Summ. J. at 7.) "To the contrary," the defendants assert, "the record shows an absence of objectifiable physical symptoms or any degeneration in the inmate's overall health resulting from his diabetes." (Id.) The defendants assert that the eye condition for which Rollins sought treatment in December 2002 is not "substantiated by any objective means." (Id.) They claim that Rollins has no proof that he has in fact suffered or that he has been put at risk of bodily injury or death as a consequence of the seven-month lull in testing. (Resp. Pl.'s Opp'n Mot. Summ. J. at 2.) They further assert that the only expert on the matter is Dreher who "suggests" that Rollins may be feigning his symptoms and they state that "the record shows an absence of objectifiable physical symptoms or any degeneration in [Rollins's] overall health resulting from his diabetes." (PHS Mot. Summ. J. at 7.)

In the alternative, the defendants assert that, in the event the Court concludes that the medical needs are serious, the record unequivocally establishes that they were not indifferent to it because his blood sugar level was monitored regularly and he has been administered insulin when required. (PHS Mot. Summ. J. at 8.) They point out that a nurse was (eventually) appointed to act as his case manager. (Id.) They also state that Rollins's eye condition has been monitored and treated since its diagnosis. (Id.)

Based upon what the defendants have put in front of me at this summary judgment juncture, I cannot conclude that Rollins's type II diabetes was not a serious illness with attendant serious medical needs when he was admitted to the prison and over the course of the 2002 spring, summer, and fall. Most courts that have referred to or addressed the question in the context of diabetes related conditions have identified diabetes as a condition falling within the first, objective Farmer prong. See, e.g., Lolli v. County of Orange, 351 F.3d 410, 420 -21 (9th Cir. 2003)("We therefore join our sister circuits in acknowledging that a constitutional violation may take place when the government does not respond to the legitimate medical needs of a detainee whom it has reason to believe is diabetic."); Natale v. Camden County Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003)(case in which the defendant PHS did not dispute that insulin-dependant diabetes is a serious illness and that the plaintiff had a serious medical need); Egebergh v. Nicholson, 272 F.3d 925, 927 -28 (7th Cir. 2001) (depriving insulin-dependant diabetic arrestee of insulin on the threat of missing a bond hearing if he had his shot met both Farmer prongs for purposes of defending summary judgment); Hunt v. Uphoff, 199 F.3d 1220, 1223 -24 (10th Cir. 1999) (noting that the District Court had recognized the plaintiff's diabetic condition and attendant heart condition as a serious medical need); Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999) (defendants agreeing that insulin-dependant diabetes mellitus is a serious illness); Nance v. Kelly, 912 F.2d 605, 607 (2d Cir. 1990) (noting in dicta that diabetes requiring a special diet could fall under the first prong of Farmer); Pandey v. Freedman, 66 F.3d 306, 1995 WL 568490, **3 (1st Cir. 1995) (unpublished disposition) (noting that denial of prescribed medicine for a condition such as diabetes could constitute a sufficiently serious harm, but

concluded that if there was any eighth amendment liability it would not attach to the named defendants).

The crux of the factual dispute in this case concerns the PHS defendants' failure to test Rollins's blood glucose level during an approximately seven-month period from April 2002 to October 2002. Rollins admits that during this period he received his prescribed diabetes medication. He did not voice any diabetes related medical complaints to the defendants until he complained about his vision problems in December 2002, approximately two months after sporadic testing of his blood glucose level had resumed. The only defendant Rollins identifies by name in connection with this lapse in blood sugar testing is Lucia Elder. He says Elder, a PHS administrator, told him on March 28, 2003, that the gap in testing could be explained because sometimes inmates fall through the cracks.[13] While such mismanagement suggests negligence on the part of

[13] Rather late in the pleading process Rollins asserts for the first time that the testing did not occur because unnamed PHS personnel were frightened by Rollins's HIV and other communicable diseases and therefore refused to test his blood. This allegation had not been properly placed before the court by Rollins in his initial response to the PHS summary judgment motion. (See Docket No. 154, Docket Nos. 157 & 158). Rollins's allegation over the defendants' motivation for the lull in testing being related to a fear of infection and a want of adequate protection are material to the subjective prong of Farmer. Such a motivation would be probative of whether the cessation of testing was driven by a non-medical reason. See Natale, 318 F.3d at 582-83; see, e.g., Hunt, 199 F.3d at 1223-24 (reversing a grant of summary judgment, concluding that there was a genuine dispute of material fact that medically-recommended procedures addressing plaintiffs diabetes were not performed). See also, Roberson v. Bradshaw, 198 F.3d 645, 648 (8th Cir. 1999) (reversing grant of summary judgment to contract physician, after the district court erroneously characterized the claim as a mere disagreement over the proper treatment, when plaintiff's allegations were that physician ignored complaints of serious adverse reactions to Glucophage and intentionally kept him on that medication; where physician denied that complaints were made, but did not claim that he considered Roberson's adverse reactions and concluded that Glucophage was nonetheless the appropriate medicine to prescribe, summary judgment was inappropriate). However, even if the court were to consider these factual allegations properly before it, the fact remains that testing had resumed in October/November prior to Rollins's elevated December test results leading to the use of insulin. Thus Rollins still fails to demonstrate how the failure to administer daily or weekly tests during the seven-month period contributed to a serious medical problem for him. Rollins is not complaining about not receiving his glucophage or other medical treatment. He is complaining that the failure to monitor his blood glucose level was in and of itself deliberate indifference to a serious medical condition. In Rollins's mind the seven-month lull in monitoring is what caused him to become insulin dependent and caused his vision problems to develop. While I agree that diabetes is a serious medical condition under the Gaudreault v. Municipality of Salem, 923 F.2d at 208, definition, the inference that Rollins wants drawn from the lack of blood sugar monitoring is neither so obvious that any layperson would recognize it nor, on this record, is it supported by any expert

the medical staff, placed in the context of the properly supported summary judgment record, it does not rise to the level of deliberate indifference to serious medical needs. The record, taken as a whole, demonstrates that the PHS defendants did treat Rollins's condition as a serious medical condition and they provided him with medication throughout the period. During this entire seven-month period nothing that Rollins points to amounts to deliberate indifference to his serious medical needs by any of the named PHS defendants.[14] By the time his blood sugar was elevated to a level that required insulin, in December 2002, the defendants were again monitoring the blood glucose level and they fully responded to Rollins's complaints.

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medical opinion. The record demonstrates that there was a standing order for blood tests and generates a factual dispute as to whether they took place during the seven-month period. However, there is nothing in the record that connects the December 2002 vision problems and need for insulin, assuming those factual events to be as Rollins relates them, to the failure to monitor blood glucose levels in the April through October period while Rollins was receiving his glucophage medication. That the failure to monitor was medically inappropriate in the face of a standing order to do so seems obvious, but the "seriousness" of this failure in the sense of an eighth amendment violation is not nearly so obvious.

[14] The PHS defendants have not parsed the role of each defendant so I cannot separately evaluate whether some of the defendants are also clearly not liable for other reasons vis-à-vis Rollins's care nor can I assess whether they are entitled to summary judgment vis-à-vis Rollins's policy and custom claims.

Rollins also asserts that on several occasions when he required insulin correction officers would overrule his medical order and intentionally obstruct his access to the insulin injections. Rollins states that even when he presented his accucheck and insulin pass to the officers they would not allow him access to the medical care and he describes how they would lock Rollins trapped between automatic doors until he passed out. (Docket No. 154 at 4.) These assertions relate to his claims against the correctional defendants and these defendants, by simply joining the PHS defendants' motion, have not established a basis for summary judgment in their favor with respect to this aspect of Rollins's suit. This part of the suit does not seem to directly relate to the seven-month period when no testing was done. In fact his complaint and "affidavit" seem to suggest that this interference took place at a time when he was scheduled for regular testing. The allegation appears actionable under the eighth amendment, in that I have already noted that diabetes is a serious medical condition and restraining someone from prescribed treatment and causing them to pass out would appear to satisfy Farmer's deliberate indifference standard. In his original complaint Rollins notes that certain of the named correctional officers overruled medical orders and interfered with his right to medical treatment. This conduct described in his affidavit corresponds to his complaint's allegations. It is not addressed by the PHS motion. Because the correctional officers have not given me a statement of fact upon which to base a recommendation, these generalized allegations appear to survive the PHS motion.

As the defendants point out, Rollins has missed his opportunity to designate an expert witness.[15] However, an expert witness is not an indispensable facet of Rollins's claim that he suffered needlessly as a consequence of the defendants' failure to closely monitor his blood glucose levels. See Roberson v. Bradshaw, 198 F.3d 645, 648 (8th Cir. 1999) (reversing summary judgment, noting that the District Court was mistaken in its conclusion that the plaintiff's failure to submit verifying medical evidence of the alleged detrimental effects of his diabetes was fatal to his summary judgment opposition, reiterating the Eighth Circuit's emphasis that the determination of whether the inmate has an objectively serious medical need can be done based on what is either obvious to the layperson or supported by medical evidence such a physician's diagnosis).[16] Rollins complains that Blaine Littlefield, a prison physician who examined him in December, 2002, could provide information about his condition at that time in support of his claim, but the defendants have failed to cooperate with his discovery initiatives. Assuming that Littlefield was available as a fact witness, according to Rollins, his testimony would support what defendants have described as the "hyperbolic" description of Rollins's condition in December 2002 regarding insulin dependency and serious vision problems caused by diabetes. For purposes of this recommended decision, I have drawn those inferences in Rollins's favor. The fact remains that in December 2002 when these problems became evident, defendants were again monitoring Rollins's blood glucose level. How their failure to comply with the standing order from April to October

[15] Citing Rhodes v. Chapman, 452 U.S. 337 (1981), Rollins contends that the Eighth Amendment looks to contemporary standards of decency rather than the viewpoint of a single expert. (Docket No. 156 at 2.)

[16] On this score I do agree with Rollins that Littlefield could testify as a fact witness. I note that Rollins has interjected his discontent with his discovery as part of his response to this motion. (Docket No. 154 at 1, 8; Docket No. 157 at 1; Docket No. 160 at 1.)

becomes material to an eighth amendment violation remains unanswered. Therefore even though Rollins has generated a factual dispute regarding the seven-month period, if this matter proceeded to trial he would be unable to carry his burden to demonstrate how the PHS defendants' medical treatment/monitoring decisions, no matter how negligently undertaken, contributed to an objectively serious medical condition.

Conclusion

I overrule Rollins's objection to the correctional defendants' desire to join in this motion by PHS for summary judgment. For the reasons articulated above, I recommend that the Court **GRANT** the PHS defendants' motion for summary judgment and the correctional defendants' motion joining that motion. However, the allegations that Rollins makes regarding the independent conduct of the correctional officers interfering with medically ordered treatments survives this motion and since the correctional defendants have not moved for summary judgment, they cannot, on this record, be granted summary judgment on the entire complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated August 5, 2004

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

ROLLINS v. MAGNUSSON et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 05/09/03
Jury Demand: Both
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

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